

STATE OF MICHIGAN  
COURT OF APPEALS

---

FRANCIS MITCHELL,

Plaintiff-Appellant,

v

MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC., WELLS FARGO BANK, N.A.,  
TROTT & TROTT, P.C., and ELLEN COON,

Defendants-Appellees.

---

UNPUBLISHED

July 18, 2013

No. 309102

Wayne Circuit Court

LC No. 11-008683-CZ

Before: STEPHENS, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting summary disposition to defendants pursuant to MCR 2.116(C)(10)<sup>1</sup> and denying plaintiff's motion to amend her complaint. We affirm.

Plaintiff's sole stated issue on appeal concerns the trial court's decision to proceed with a hearing in the absence of plaintiff's counsel. Plaintiff argues that the court should have set a new hearing date that accommodated plaintiff's counsel's schedule.

MCR 2.119(E)(3) provides that "[a] court may, in its discretion, dispense with or limit oral arguments on motions[.]" This Court reviews a trial court's decision to dispense with oral argument on a motion for an abuse of discretion. *Fast Air, Inc v Knight*, 235 Mich App 541, 550; 599 NW2d 489 (1999). In *Fast Air, Inc*, 235 Mich App at 550, the plaintiff argued that the trial court erred by deciding a motion for summary disposition without oral argument. This Court held that the trial court did not abuse its discretion in deciding the motion without oral argument where the parties' briefs fully apprised the court of the parties' positions. *Id.* In this case, the trial court's ruling shows that it was informed of the parties' positions through their

---

<sup>1</sup> Defendants moved for summary disposition under MCR 2.116(C)(8) and (C)(10). Although the trial court did not specify the subrule under which it granted defendants' motion, because the court considered evidence outside the pleadings, we review the order pursuant to MCR 2.116(C)(10). *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002).

briefs. The court's decision to issue its ruling at the hearing without oral argument from any of the parties was not an abuse of discretion.

While she failed to list it as an issue on appeal in her Statement of Issues, plaintiff also contends that the allegations in her amended complaint stated a claim for which relief could be granted. Defendants briefed the issue as an ancillary consideration to a determination regarding whether oral argument would have made a difference to the outcome. For that reason, we will address the issue. Plaintiff argues that defendants Wells Fargo Bank and Trott & Trott, P.C., did not comply with MCL 600.3204(4) because she

never received the notice to be assessed for a loan modification pursuant to MCL 600.3205a either by U.S. Mail or Certified Mail return receipt. As such, pursuant to MCL 600.3204(4), Wells Fargo was precluded from commencing foreclosure and thus the sheriff sale is void *ab initio*.

This Court reviews a trial court's decision regarding amendment of a complaint pursuant to MCR 2.116(I)(5) for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

MCL 600.3204(4) precludes the commencement of proceedings for foreclosure by advertisement if "[n]otice has not been mailed to the mortgagor as required by section 3205a." The notice required by MCL 600.3205a<sup>2</sup> must include the reasons why the mortgage is in default, contact information for the mortgage holder and servicer, a list of housing counselors, and information about the borrower's right to request a meeting to work out a modification. The notice must be served "by mailing the notice by regular first-class mail and by certified mail, return receipt requested, with delivery restricted to the borrower, both sent to the borrower's last known address." MCL 600.3205a(3).

Contrary to plaintiff's argument, "defects or irregularities in a foreclosure proceeding result in a foreclosure that is voidable, not void *ab initio*." *Kim v JP Morgan Chase Bank, NA*, 493 Mich 98, 115; 825 NW2d 329 (2012). To be entitled to set aside the foreclosure sale, plaintiff must prove that she was prejudiced by the noncompliance with the statutory requirements by showing that she "would have been in a better position to preserve [her] interest in the property absent [the] noncompliance with the statute." *Id.* at 115-116.

Plaintiff was asked numerous times to actually provide an amended complaint in the instant case. It was after several requests that she filed a proposed amended complaint, presumably after considerable rumination. It is of primary concern that plaintiff's proposed amended complaint does not even allege that she did not receive notice of her rights concerning modification. Rather, plaintiff alleged:

---

<sup>2</sup> We note that MCL 600.3205a was repealed by the Legislature. MCL 600.3205e. However, the parties do not dispute that MCL 600.3205a was in effect at the time of the foreclosure in the instant case.

72. Plaintiff sought Defendants or their agents for a loan modification or some other remedy to save their [sic] home.

73. That Plaintiff followed the statute and contacted a housing counselor.

74. That despite Plaintiff sending in her documents, Plaintiff was not reviewed for a loan modification.

75. That Defendants wrongfully denied Plaintiffs [sic] a modification.

76. That as a result of Defendants['] violation of MCL 600.3205a-c, Plaintiff's home has been sold through a sheriff sale and Plaintiff has spent countless time and resources fighting to remain in her house.

77. That Plaintiff asserts that legal and actual title to the property should transfer back to Plaintiff.

The allegations in the proposed amended complaint omit any contention that plaintiff lacked notice of her rights to modify, as plaintiff contends on appeal. They do include contradictory assertions that she was not reviewed for such a modification and that she was denied the modification. The allegations indicate that plaintiff contacted a housing counselor and requested a modification pursuant to the statute. It is noteworthy that subsequent to her contact with the housing counselor a sheriff's sale was held where she does not claim an absence of notice. Plaintiff did not exercise her right under MCL 600.3205a(5) to file a claim for a judicial foreclosure where the statutory modification rights notice has not been provided. Assuming arguendo that plaintiff did not receive notice of her rights in compliance with MCL 600.3205a(3), because her allegations indicate that she exercised her rights, there is no basis for concluding that she was prejudiced by the purported deficiency. Accordingly, any amendment would be futile.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Kurtis T. Wilder

/s/ Donald S. Owens